No. 14,541

United States Court of Appeals

For the Ninth Circuit

GLEN W. PERSONS,

Appellant,

vs.

GERLINGER CARRIER COMPANY,
a corporation,

Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal by appellant Glen W. Persons from a judgment on the verdict against him and in favor of appellee Gerlinger Carrier Co. in the United States District Court for the District of Oregon in an action for damages for personal injuries suffered by appellant, a resident of the State of California, as a result of the negligence of appellee, Gerlinger Carrier Co., an Oregon corporation. Jurisdiction of the District Court is based upon the diversity of citizenship and the fact that the amount in controversy ex-

ceeds $3,000.00, exclusive of interest and costs, pursuant to the provisions of 28 *U.S.C.A.* 1332(a)(1). (Complaint, Vol. I, Trans. p. 3; Answer, Vol. I, Trans. p. 8-9; Pre-Trial Order, Vol. I, Trans. p. 26.)

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon the foregoing facts, Notice of Appeal (Vol. I, Trans. p. 39) and the provisions of 28 *U.S.C.A.* 1291, and Rule 30 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This is an action for damages for personal injuries suffered by appellant as the result of negligence of appellee. Appellee is a manufacturer of fork lift trucks used in factories and lumber yards for handling bulk products. In September, 1952, appellee sold one of its fork lift trucks to one Philbrook for the lumber mill business of appellant's employer at Philo, California. (Vol. I, Trans. pp. 26, 27.) The Gerlinger carrier was loaded onto Philbrook's truck at the factory in Oregon by appellee with the front boom assembly detached so that when it was unloaded the motor section would be driven off under its own power and the fork lift assembly would be unloaded separately with a crane or other machine. (Vol. II, Trans. pp. 13-26.) Philbrook transported the Gerlinger carrier to Philo, California, and on September 9, 1952, appellant proceeded to drive the carrier down a ramp or incline off the Philbrook truck with the

boom detached. The carrier suddenly turned over and fell on appellant crushing his pelvis, left hip, spine, damaging his left kidney, puncturing his bladder and damaging the nerves in the pelvic area all resulting in permanent injuries to his general damage in the sum of $200,000.00. A duly licensed consulting engineer computed the dynamics of the carrier involved in the accident and found it to be unstable and dangerous to operate with the fork lift detached and at the trial testimony established that the carrier involved in the accident was of the same design as had been produced by appellee for several years.

The specifications of negligence of appellee upon which the case went to trial are stated in the pretrial order (Vol. I, Trans. pp. 29-30) and we summarize them as (1) failure to warn the purchaser to assemble the Gerlinger carrier before operating it, and (2) failure to mark an instruction plate in the cab of the Gerlinger carrier warning against operating it with the boom assembly detached; though appellee under both (1) and (2) knew or should have known that it was unstable and extra-hazardous and was likely to overturn if operated with the boom assembly detached and that this condition would not be apparent to persons who could reasonably be expected to unload it; (3) placing on the market and selling a fork lift truck inherently dangerous and extra-hazardous due to basic instability when appellee knew or should have known it would be operated by persons such as appellee under the circumstances and conditions in this case.

Errors upon which this appeal is based are summarized in the Specification of Errors and are not stated here to avoid unnecessary repetition. The errors complained of are (1) In refusing to allow discovery, (2) In admitting testimony, and (3) Improper remarks by the Court during the trial and in the instructions to the jury.

QUESTIONS PRESENTED.

1. Whether the District Court properly denied appellant the right of discovery concerning evidence of other prior accidents and engineering knowledge in possession of appellee going to the inherently dangerous characteristics of appellee's carrier when operated with fork lift boom removed. And further whether appellee's objection to the interrogatories was too late.

2. Whether testimony of the absence of prior accidents and existence of prior accidents under the conditions not shown to be identical or similar in all significant factors is admissible.

3. Whether the question asking if the witness had ever known of any previous accidents, regardless of conditions and circumstances, and also testimony of what others had told him concerning such previous accidents, is admissible.

4. Whether opinion testimony, based upon experience with other types and makes of machinery, that there were no unusual dangers in operating the particular machinery, is admissible.

5. Whether questions leading and suggestive in nature on direct examination were proper.

6. Whether a witness is qualified as an expert by experience with other types and makes of machinery to testify as to the effect, if any, upon stability of changes in the design of the particular machine.

7. Whether opinion testimony that the particular machine, different from others that had passed tests for particular purposes, would also pass the same tests, was admissible.

8. Whether testimony that no warning was given concerning possible dangers in operating other makes and types of carriers was admissible as to the particular machine in question was admissible.

9. Whether a person familiar with other types and makes of machinery may be permitted to answer hypothetical questions upon the operational characteristics of the particular machine under the particular circumstances.

10. Whether the trial court so intermingled its comments upon the evidence with its instructions of law to the jury that the instructions were prejudicially confusing and misleading.

11. Whether the failure of the trial court to instruct the jury upon each issue of negligence raised was error.

12. Whether the failure of the trial Court to give each or any of the instructions proposed by appellant was error.

13. Whether the instructions to the jury were so palpably erroneous that the Court of Appeals will review them on its own motion.

SPECIFICATION OF ERRORS.

The District Court erred in:

1. Sustaining appellee's objections to appellant's Interrogatories filed June 16, 1954 (Vol. I, Trans. pp. 16-20, 24-25) which prevented appellant from obtaining sufficient information to prepare for trial concerning the dynamic and static weight and balance characteristics, dimensions of various parts, and capacity of the Gerlinger Carrier involved and information of previous accidents, officers of appellee having knowledge of previous accidents and designing and manufacturing the Gerlinger carrier concerned, and statistical information on the number produced, years in which produced, sales, prices and sums spent on engineering and design.

2. Admitting testimony of Victor O. Williams who handled finances as an executive vice-president and general manager of appellee (Vol. II, Trans. pp. 39-40), that he had never received a complaint concerning instability, and that he had never heard of a Gerlinger fork lift truck tipping over while being unloaded and loaded where the fieneral practice was to ship them with the boom assembly detached (Vol. II, Trans. p. 53) over the objection that it was irrelevant.

3. Admitting testimony of appellee's witness Gohrke that no previous accident where a Gerlinger

fork lift truck had tipped over had come to the witness's personal knowledge but that he had heard of one tipping over with the boom assembly attached under circumstances other than were involved in this case, over the objections that it was hearsay, and a further objection that what happened in another situation was immaterial, irrelevant and incompetent. (Vol. II, Trans. p. 186-187.)

4. Admitting testimony of appellee's witness Robert Blacketer on direct examination, where the witness was an operator of a lumber remanufacturing plant using lift trucks of other makes, and in which the witness was asked and he testified that in his opinion there was no unusual danger in operating a Gerlinger fork lift truck over the objection that his opinion was immaterial and based upon machinery of other makes and types than was involved in this case. (Vol. II, Trans. pp. 164-166.)

5. Admitting further testimony of witness Blacketer on direct examination giving yes and no answers to questions over the objections stated in the preceding specification and also that the questions were leading and suggestive, concerning the effect of adding, subtracting, and relocating weights and parts of the mechanism of the Gerlinger carrier affecting its stability. (Vol. II, Trans. pp. 166-167.)

6. Admitting testimony of appellee's witness Harry A. Herzog, as an expert having experience in operating different kinds of fork lift trucks in lumber operations, that in his opinion (1) shifting side shifter mechanism or (2) adding 1000 pounds to a different

location on the Gerlinger carrier would make no difference in its stability, over the objections that the witness had no experience or knowledge qualifying him as an expert concerning the Gerlinger carrier involved in this action. (Vol. II, Trans. pp. 172-173.)

7. Admitting testimony of Ray W. Gohrke, assistant manager of appellee (Vol. II, Trans. p. 183), that in his opinion a difference of 1500 pounds between the Gerlinger carrier that fell on appellant and the fork lift trucks involved in U. S. Navy Compliance tests would make no difference as to whether the Gerlinger carrier involved would pass the Navy tests, over the objection that the opinion had no sufficient foundation in data and facts susceptible of proof as distinguished from a layman's observation. (Vol. II, Trans. p. 183.)

8. Admitting testimony of appellee's witness Glenn Herz that no warning placards or notices were placed on Hyster or Ross makes of fork lift trucks or carriers when shipped to the purchaser to warn of any instability or danger in operating the trucks with the boom assembly detached, over the objection that there was no relationship whatsoever between such other makes of trucks and the Gerlinger carrier in this case (testimony irrelevant, immaterial, and incompetent), and, further, in overruling appellant's motion to strike the testimony. (Vol. II, Trans. pp. 200.)

9. Admitting testimony of appellee's witness Glenn Herz answering hypothetical questions that under the circumstances of the case and, apparently based upon his knowledge of other types of fork lift trucks, the

Gerlinger carrier would tip over with a combination of excess speed and sharp turning, over the same objection as in the foregoing specification 8. (Vol. II, Trans. pp. 200-202.)

10. Admitting testimony of appellee's witness, Lloyd H. Peterson, concerning tests of Gerlinger fork lift trucks, of types and kinds not shown to be the same as the Gerlinger carrier herein concerned, for lateral and longitudinal stability over the objections that the testimony was immaterial, irrelevant and incompetent, and, further in overruling a motion to strike the same, and in the same line of questioning, that the testimony was hearsay. (Vol. II, Trans. pp. 207-208.)

11. Failing to distinguish between comments upon the evidence and instructions of law in giving instructions to the jury. The charge to the jury, in its entirety was as follows:

(Vol. II, Trans. pp. 235-240.)

"Court's Instructions to the Jury.

The Court: Ladies and Gentlemen, in trials like this it is the function of the jury to pass on disputed questions of fact and the function of the Court is to present to the jury the law that applies to the case; but many times we get cases where the facts and the law do not intertwine and it becomes necessary for the Court to make some comment on the facts for the sake of clarity.

I was not sure when we began this case, and I don't know now that I can make a satisfactory clear statement of just what the claim is against

the defendant, as to what duty it had, as a matter of law, towards this unfortunate man and wherein it violated that duty.

The defendant, like a number of its competitors in its field in this great lumber industry here, was engaged in the making of a piece of heavy machinery that has been widely distributed over a long period of years.

It was built to carry loads, with a boom as an essential part of the load-carrying operation. It was not built to be operated with the boom off and without a load, the way it was being operated at the time this accident occurred.

I do not see much to this engineering talk on both sides about the center of gravity and the like. We are not dealing here with an accident that occurred when the machine was being used, at the time, for the purposes for which it was built. We are dealing with an accident that occurred under unusual circumstances, and, just in connection with the unloading of it, it had to be disassembled to load it and to unload it.

It may be true—I don't know; that is a question for you to pass on in this case. It may be true that when the boom was taken off, as was necessary to unload it, that it lost some of its balance that otherwise it would have had, but how are you going to avoid that? It had to be built with reference to its primary use when it was carrying loads.

A very narrow question in this case is whether, under these exceptional and infrequent circumstances, when the machine was being operated and unloaded, there might have been some extra caution needed to avoid any imbalance which re-

sulted from the boom being off. I don't say that there was any imbalance. There is testimony here to the effect that the balance was very little affected when the boom was off, but that is a question, as I say, for your consideration.

The question here, and the only question, is whether there should have been some warning given with regard to these particular and exceptional occasions when the machine was being used in loading and unloading, that some extra care perhaps should be taken in handling it. That is the only question in this case.

We are not trying here at all—I am not trying and you are not trying the engineering features of this machine, as a general proposition. If you think, in view of plaintiff's charge of negligence —and that is the only negligence you are entitled to consider—there was fault and was negligence on the part of the defendant in not posting some warning where it would be obvious to anybody handling it in loading and unloading, that there was some unusual risk involved as to balance, that is the substance of what you should consider here.

Negligence has to do with reason, and a man is negligent when he does something that an average person, under the same or similar circumstances, would not have done, or when he fails to do something that, under the same circumstances, the average reasonable person would have done, and that is the only question here for your consideration: Did this manufacturer, in view of its experience over a long period of time in the distribution of a great number of these machines, never having had an accident of this sort reported to it, in view of its own knowledge about its own machine, considering also its duty to the public—

whether this defendant was in that respect negligent; in other words, did it fail to do something that an average reasonable manufacturer, under similar circumstances, would have done, namely, putting some notice in this machine saying, in effect, that 'This is a special and unusual situation which arises at the time of loading and unloading of the machine,' something about being extra careful, or something along that line.

Plaintiff has the burden of satisfying you, like the plaintiff in every case, that the defendant was negligent, that it did fail to do what the average reasonable manufacturer would have done, that is, that the average reasonable manufacturer would have given such notice.

If the plaintiff has satisfied you that was so and that in that respect the defendant failed in its duty to the public and that that caused the accident to the plaintiff, then the plaintiff is entitled to a verdict. If you are not so satisfied, the verdict should be for the defendant.

There not only must be negligence alleged and proved that it was improper conduct of the defendant, but that it must have been the proximate cause of the accident. That means the direct cause.

The defendant's idea is that the cause of the accident was this unfortunate man's own conduct under the circumstances, and that he was guilty of contributory negligence with respect to how the accident happened.

The law as to that is, even though the defendant, in this case the manufacturer, was negligent as charged, if the plaintiff himself contributed to the accident by his negligence, meaning again failure

to act as an average reasonable person would under similar circumstances, he may not recover. That would be the rule in this case. The burden as to contributory negligence is on the defendant.

If you feel the plaintiff is entitled to recover you should award him such compensation as will fully and fairly compensate him for pain and suffering in the past, as well as that which he may be reasonably certain to suffer in the future, plus out-of-pocket expenses, such as doctor and hospital expenses, incurred in the past and reasonably certain to occur in the future; as well as loss of earnings in the past and loss of earnings which may reasonably be expected to occur in the future, to the extent that might be reasonable, reasonably expected to occur.

Your verdict must not be based on sympathy or prejudice.

If, after applying the law, you find this defendant, the manufacturer, is not liable for what occurred here, your duty will be plain; you will find for the defendant. On the other hand, if you find the defendant was negligent and had caused the accident and that there had not been contributory negligence, your duty will be likewise plain; your verdict will be for the plaintiff.

You will take the exhibits with you to the jury room and give them the weight you feel that they are entitled to, along with the form of verdict. You will elect a foreman on retiring. Your verdict must be unanimous. You will be furnished with two forms of verdict, which are self-explanatory.

Swear the Bailiff.

(Bailiff sworn.)

The Court: I have discussed the facts which I think necessary for purposes of clarity, but I want to say to you this one thing: You are the exclusive judges of the credibility of the witnesses and of the weight and value of the testimony. If I have made any expressions as to any view that I entertain of disputed questions of fact or given you that impression, you are free to disregard such expressions.

You may retire."

12. Failing to instruct the jury upon each of the issues of negligence raised in the pleadings and pretrial order, and in limiting its instruction upon liability to a question of whether appellee should have given warning of a dangerous condition under the circumstances. (Vol. I Trans., p. 39-40; Vol. II, Trans., pp. 235-240, as copied in Specification 11, above.)

13. Failing to give each of plaintiff's proposed instructions numbered 3, 4, 5, 6, 7, 8, and 9. (Vol. III, Trans; Vol. II, Trans. pp. 235-240, instructions given copied under Specification 11, above.)

SUMMARY OF ARGUMENT.

I. The District Court improperly denied appellant his right of discovery concerning evidence of prior accidents and engineering knowledge and information in possession of appellee going to the inherently dangerous characteristics of appellee's carrier when operated with fork lift boom removed.

A. The objections to interrogatories were filed too late for the Court to act upon them.

B. Appellee's objections, if timely, were invalid.

II. Testimony that the witness had never heard of a prior accident is inadmissible.

Such testimony is hearsay, and has no probative value.

Hearsay so affects the fundamental rights of the parties in this action that it is a matter of substance rather than procedure; the law of California and not Oregon should apply.

III. Evidence tending to show the absence of other accidents, or injuries is inadmissible where the place, method, or appliance in question is not shown to have received the same use as that given it by plaintiff, or when the place, method, or appliance in question is in itself negligent or dangerous.

IV. The instructions of the District Court to the jury consisted of an admixture of comment on facts and erroneous instructions of law confusing and misleading such that the Court of Appeals may review them upon its own motion.

A. The Court of Appeals may on its own motion review patent errors in instructions to the jury, notwithstanding failure of appellant to make specific objections pursuant to Rule 51 of the Federal Rules of Civil Procedure.

B. The instructions in this case are patently erroneous.

Prejudicial comment of judge that it was uncertain what appellant's case was.

Comments on evidence and erroneous instruction to disregard the only competent evidence in the trial upon the subject of the dangerous and unstable characteristics of appellee's product were not justified.

The instructions ignored one of appellant's principal charges of negligence and gave erroneous instructions upon other charges of negligence.

The instructions failed to charge that contributory negligence is not a defense unless it is a proximate cause of the event.

There was no competent evidence upon which to allow the defense of contributory negligence to go to the jury.

V. Opinion testimony based upon experience of the witness with other types and makes of machinery and not shown to be based upon the particular type and make of machine in the present case is inadmissible.

A. Opinion not admissible where no experience with the same type of machine as involved in case was shown.

B. Opinion testimony concerning the effect of relocating a part of the mechanism or adding weight without qualifying the witness as an expert in such matters was inadmissible.

VI. Error once shown is presumptively prejudicial unless absence of prejudice shows from the entire record on appeal.

ARGUMENT.

I.

THE DISTRICT COURT IMPROPERLY DENIED APPELLANT ITS RIGHT OF DISCOVERY CONCERNING EVIDENCE OF PRIOR ACCIDENTS AND ENGINEERING KNOWLEDGE AND INFORMATION IN POSSESSION OF APPELLEE GOING TO THE INHERENTLY DANGEROUS CHARACTERISTICS OF APPELLEE'S CARRIER WHEN OPERATED WITH FORK LIFT BOOM REMOVED.

Appellant filed a set of interrogatories on June 16, 1954, (Vol. I, T. 16-20) to obtain appellee's information and knowledge of prior accidents and engineering data, and a motion for production of documents on June 22, 1954. Appellee filed objections to the interrogatories on June 29, 1954. (Vol. I, T. 24.)

A. The objections to interrogatories were filed too late for the Court to act upon them.

Rule 33 of the Federal Rules of Civil Procedure read in part:

> "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. * * * Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined. * * *"

The objections were filed late but were nevertheless sustained.

B. Appellee's objections to the interrogatories of June 16, 1954, if timely, were invalid.

Appellee did not object to particular questions in the interrogatories; his objections sustained by the order of July 12, 1954 (Vol. I, T. 25) were general, that is, (1) existence of prior depositions of appellee's president and shop foreman, (2) prior interrogatories, (3) interrogatories unreasonable in their extent and nature, and (4) interrogatories not served within a reasonable time after commencement of the action and within a reasonable time prior to trial.

A statement of principles governing the discovery process generally appears in *Hickman v. Taylor,* 329 U.S. 495, 91 L. ed. 451, 67 S. Ct. 385, where the Supreme Court said:

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior Federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those

> issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

and

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his oppenent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

The fact that prior depositions may have been taken is of no consequence; there is no claim that the information had already been obtained in those depositions. The first interrogatories of appellant (Vol. I, T. 10-11) involved other information and questions*.

The requirement, as a matter of social philosophy, that the manufacturers of industrial machinery employ ordinary safety methods including the determination of tipping characteristics in machinery propelled across the surface of the ground, is so soundly estab-

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*Three year delay did not bar motion to produce documents. (*Farr v. Delaware, L. & W. R. Co.*, 7 F.R.D. 494.) That defendants had been previously examined on subjects and that state court had ruled adversely on substantially same matter did not bar motion to produce. (*Republic of Italy v. De Angelis*, 14 F.R.D. 519.)

lished in our democracy of this twentieth century that it does not permit of argument. We do not know to this day whether the appellee employed a qualified engineer to analyze the dynamic stability of the machine which crushed appellant, maiming him for life, or whether the design was merely the outgrowth of amateur trial and error. It is suggested that, for the purpose of considering whether appellant had a fair trial, the omission by the appellee to produce scientific information constitutes an admission that none was available. Without discovery of the facts which go to the very essence of the cause of action, how could appellant receive justice under the trial Court's attitude, reflected by his ruling on the interrogatories and the motion to produce documents for inspection, under Rules 33 and 34.

II.

TESTIMONY THAT THE WITNESS HAD NEVER HEARD OF A PRIOR ACCIDENT IS INADMISSIBLE.

Appellant called Victor O. Williams, executive vice-president and general manager handling finances for appellee, and he was asked the following questions after testimony that it was always the policy to ship Gerlinger fork lift trucks with the boom assembly detached: (Vol. II, T. 53.)

> "Q. In the time Gerlinger has been manufacturing these fork lift trucks has there ever been a case of one tipping over while being unloaded or loaded?
>
> A. Not to my knowledge.

Q. In these years during which you have been making them has there ever been a complaint, either in Court or to the Gerlinger Carrier Co., as to the stability of this fork lift truck when being loaded or unloaded or any other time?

A. No.

Mr. Beatty. Objection as irrelevant.

The Court. Objection overruled.

A. No, sir.

Mr. Cosgrave. Q. What is your answer?

A. I said No, we have had no complaints.

Q. Do you know of any case where the load has ever tipped in any direction at all?

A. I heard of one.

Q. Do you know what one that was?

A. That was at Merced, California, and the lift truck, the fork lift truck, then was empty and the driver was racing across the yard. That is what was told to me—the driver was racing across the yard and he hit a depression and he lost control of the lift truck and turned over.

Q. Have you ever had a case where a loaded one tipped? Do you remember any cases?

A. Not to my knowledge."

The above line of questioning has all the vices stringently criticized in *First National Bank v. Stewart,* 114 U.S. 224, 29 L. ed. 101, 5 S. Ct. 45, where the bank teller was asked "Had you any information, from any source, of any money being received at the Bank, or on or about the Wednesday preceding the McMillan's death?" The offer of proof showed a negative answer was anticipated. The Supreme Court sustained the action of the trial Court in sustaining an objec-

tion to the question with comments applicable to the case at bar.

> "The inadmissibility of both the question and the answer, had the answer been given, is obvious. The answer called for the information which from any source might be in the possession of the witness, and not for his knowledge. An answer detailing the hearsay statements of others, whether verbal or in writing, made at any time and place, would have been responsive. The objection to the question was well taken, and the Court was right in excluding it. * * * A negative answer would have been too vague and conjectural to be admitted as evidence. It did not appear that many payments of money have been made to the Bank without knowledge of the witness. It was not shown what his duties were, whether to receive or to pay out money."

It was not shown that the witness Williams would have necessarily had knowledge of prior accidents. The testimony shows on its face that it is based solely upon hearsay reports related to him by others who may or may not have had personal knowledge of the events; there could have been many of which he had no knowledge. The testimony has no probative value and was, therefore, entirely irrelevant, as well as incompetent and immaterial.

Appellee's witness, Ray W. Gohrke, assistant manager of appellee, was asked questions and answered over objections. (Vol. II, T. pp. 186-187.)

> "Q. Mr. Gohrke, has there ever come to your attention, in your capacity at Gerlinger Carrier

Co., any incident other than the one involved in this case, of Gerlinger lift trucks tipping?

A. Not to my direct knowledge, No.

Q. Well, have you ever heard of any tipping?

A. One without a boom on it, No.

Q. Did you ever hear of one with a boom on tipping?

A. Oh, yes.

Q. Could you tell us what the particular circumstances were, as you understood them?

Mr. Dilley. That is purely hearsay. Objection is made on that basis.

The Court. He may answer.

Mr. Cosgrave. Q. Would you answer, please?

A. In one particular case—I don't remember the name of the plant, but I do know that it tipped over because they had a load up too high on it, and I rather think it tried to dump the load. There was something—I think there was another one that I know of tipped sideways because one of the wheels broke through the dock. Those are the only two I recall.

Q. I will ask you this, whether those are the only instances you know of in your 30 years' experience with Gerlinger Carrier Co.?

A. Yes.

Mr. Dilley. Objection is made, your Honor, on the basis that what happened in another situation is immaterial and irrelevant, as well as incompetent, with regard to what occurred to the machine in this case and in the conduct of the vehicles in this case.

The Court. Overruled.

Mr. Cosgrave. Q. Would you answer that, if those are the only cases of which you know?

A. That is right."

The same argument applies to this line of testimony.

It is well established that hearsay evidence, unless of a kind and character admitted under a generally recognized exception, is inadmissible. *Wigmore on Evidence* (Third Edition) section 1360, et seq., traces the development of the hearsay rule over the centuries. It is an essential part of the process of finding the truth in a dispute. Its gravamen is the accessibility of the declarant for cross-examination; fundamental rights of the parties to a fair trial depend upon enforcement of the hearsay rule to the extent that it has the characteristic of a substantive rule rather than a matter of procedure.

It is established that the law of the place of injury controls substantial rights where a negligent act in one state has harmful consequences in another state. *Vancouver S. S. Co. v. Rice,* 288 U. S. 445, 77 L. ed. 885, 53 S. Ct. 420, affirming C.C.A., *The City of Vancouver,* 60 F. 2d 793, cert. granted *Vancouver S.S. Co. v. Rice,* 287 U. S. 593, 77 L. ed. 417, 53 S. Ct. 220, a case which came up from Oregon and held that the place of death and not the place in which the injury causing death governed. See also: 15 C. J. S. pp. 899-900, "Conflict of Laws," sec. 12(2), *"Lex Loci Delicti."*

It is further stated in 65 C.J.S. p. 859: "It has been held however, that conclusions to be drawn from the evidence in determining whether or not a jury case has been made must be determined by the law of the place where the accident involved occurred; and,

where the evidential matters affect the right of action and do not relate merely to practice or procedure in the enforcement of the right, the lex loci delicti controls."

Thus, where substantial rights are directly controlled by what procedural rule would otherwise be followed, the law of California applies as the place of injury.

The law of California clearly excludes the evidence above quoted. *Murphy v. Lake County,* 106 C.A. 2d 61, 234 P. 2d 712; *Giddings v. Superior Oil Co.,* 106 C.A. 2d 607, 235 P. 2d 843.

The rapidity of the questions and answers given followed by the summary ruling of the Court upon the objection demonstrates the reason why all of these arguments were not advanced at trial; there was no opportunity allowed.

III.

EVIDENCE TENDING TO SHOW THE ABSENCE OF OTHER ACCIDENTS, OR INJURIES IS INADMISSIBLE WHERE THE PLACE, METHOD, OR APPLIANCE IN QUESTION IS NOT SHOWN TO HAVE RECEIVED THE SAME USE AS THAT GIVEN IT BY PLAINTIFF, OR WHEN THE PLACE, METHOD, OR APPLIANCE IN QUESTION IS IN ITSELF NEGLIGENT OR DANGEROUS.

The law as here stated appears in 65 C.J.S. at page 1057. It applies to the above cited testimony concerning other accidents. That testimony is harmful under the circumstances of this trial because it inferred to the jury that the Gerlinger fork lift truck would not

turn over unless operated under the circumstances of other accidents, based upon rumor and reports to the witnesses from unknown sources.

The inadmissible character of the testimony is further demonstrated by the negligence cases of *Denver City Tramway Co. v. Hills,* 50 Colo. 326, 116 P. 125, 126 L.R.A. N.S. 213, where defendant's claims agent handling all reports of accidents for the company for many years was not permitted to testify he had never received a report of an accident similar to the case in trial, and *Blackwell v. J. J. Newberry Co.* (Mo. App.) 156 S.W. 2d 14, to the same effect with further observation of the deprivation of opportunity for cross-examination.

IV.

THE INSTRUCTIONS OF THE DISTRICT COURT TO THE JURY CONSISTED OF AN ADMIXTURE OF COMMENT ON FACTS AND ERRONEOUS INSTRUCTIONS OF LAW CONFUSING AND MISLEADING SUCH THAT THE COURT OF APPEALS MAY REVIEW THEM UPON ITS OWN MOTION.

A. The Court of Appeals may on its own motion review patent errors in instructions to the jury, notwithstanding failure of appellant to make specific objections pursuant to Rule 51 of the Federal Rules of Civil Procedure.

This rule is designed to promote due administration of justice and avoid the disastrous consequences of a technical failure to object. A leading decision is *Hormel v. Helvering,* 312 U.S. 552, 557, 61 S.Ct. 719, 721, 86 L.ed. 1037, on certiorari to review a judgment setting aside a deficiency assessment of income tax on income from family trusts. The *Hormel* case, supra,

was followed in *Shimabukuro v. Nagayama,* 140 F.2d 13, 15, and in *Dowell, Inc. v. Jowers,* 166 F.2d 214, 220-221, 2 A.L.R. 2d 442, a wrongful death action where the instruction to the jury and comment of the Court of Appeals was:

> " 'I might say this, if you reach the question of an amount, the law of the State of Louisiana applies and this is not to control you but I might indicate to you that in cases in Louisiana of somewhat similar character—some $10,000 or $15,000 say, I do not say that it is too low, but it has been allowed; you have in this case the wife and her individual case of her own, and each of the three children. You have a case here just as if you had four people to deal with instead of one person, each one of whom is entitled to a separate consideration.' "

After noting the failure of counsel to object to the instruction quoted and holding it to have been prejudicial error, the Court of Appeals stated:

> "Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, provides that no party may assign as error the giving or failure to give an instruction unless he distinctly presents to the trial Court his ground for objection. * * * The Court's right in a proper case to consider on its own motion errors patent upon the face of the record where no objection was made, was considered by the United States Court of Appeals for the District of Columbia in Shimabukuro v. Nagayama, 1944, 140 F.2d 13, 15. We find ourselves in thorough accord with the decision in that case."

The Court of Appeals continued by quoting from the *Hormel* case:

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. Mr. Justice Black has recently said: 'There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.' "

The error in the *Shimabukuro* case, *supra,* consisted of instructions inviting the jury to guess and compromise by accepting and rejecting at random items scattered on nine pages, without considering the authenticity of the exhibits as a whole, to determine the amount, if anything, owed by defendant to plaintiff for money advanced.

The same result was reached in *Union Pacific R. Co. v. Owens,* 142 F.2d 145, by the United States Court of Appeals for the Ninth Circuit, without reliance upon any other cases as precedent for its action in reviewing instructions on its own motion, where it was considered that the meaning of Rule 51 had been satisfied by objections to evidence upon which the erroneous instructions appeared to have been predicated in the course of trial.

The error in *Harlem Taxicab Ass'n v. Nemesh,* 191 F.2d 459, was in stating a presumption of fact as a

conclusive presumption of law, and since the parties had raised objections to testimony during the course of trial upon which any presumption might be based, it was stated that the spirit of Rule 51 had been observed and reviewed the instructions on its own motion.

B. The instructions in this case are patently erroneous.

The instructions to the jury are quoted in full in the specifications of errors and are not repeated here. The opening paragraphs that the judge did not know whether he could "make a satisfactory clear statement of just what the claim is against the defendant, as to what duty it had, as a matter of law, towards this unfortunate man and wherein it violated that duty."

There was a pretrial conference and the parties submitted proposed instructions of law setting forth their views of law of liability and the duty owed by the manufacturer. The pretrial order (Vol. I, T. 29-30) shows the contentions upon which trial was had.*
The law of the case was known to the Court.

A most grievous error was the destruction of vital proof for appellant's case. Plaintiff's case was based upon the manufacturer's negligence in manufacturing

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*The proposed instructions of the parties were not in the file according to information reaching counsel for appellant when the record was certified to this Court. Since discovery of that fact, counsel have been attempting to obtain them and place them in the record by cooperating with the request of the trial Court to stipulate to the existence of such instructions and have copies certified to the Court of Appeals for the record. This was not completed at the time this brief is prepared.

an inherently dangerous instrumentality and in failing to provide a warning to persons likely to be injured by operating it.

Mr. Arthur M. James, a consulting and practical engineer with specific experience in computing the factors involved in designing machinery of the type involved in this case established that the machine was inherently dangerous when operated without the boom and fork lift assembly. (Vol. II, T. pp. 114-155.) No real attempt was made by the defense to produce similar evidence other than the generalities stated by persons without engineering background, and where one person claimed an engineering background, no analysis of important factors was shown. (Vol. II, T p. 195, et seq.)

Mr. James gave the only genuine analysis and opinion of the unstable and dangerous characteristics of the Gerlinger fork lift truck involved under the circumstances of the case. This error was foreshadowed by the comments of the trial judge in the absence of the jury when appellant's attorney was objecting to the use of a motion picture film without first providing appellant's expert witness to study the film and advise so that appellant could be properly prepared to object to exhibition of parts not germane to the issues or rebut any inferences it might raise. (Vol. II, T. pp. 159-160.)

> "The Court. I can assure you of one thing right now. Engineers are not going to decide this case. If I ever talk to the jury about this, I am going to talk to them as ordinary people. You can-

not take hours and days on a lot of stuff about static and all that kind of business. You are privileged, of course, to do that, but the case will turn, as far as I am concerned, and I think as far as the jury is concerned, upon much more practical considerations. You may show the film, but let's get along with our work. Bring the jury down."

This marked the turning point in the trial. It is not known to counsel whether any of the many spectators were friends, associates, or relatives having access to the jurors. The intention of the Court was carried into effect by its several rulings permitting testimony attacked elsewhere in this brief.

Destruction of appellant's expert proof was completed by the trial Court instructing the jury and (1) praising the "great lumber industry" of the state, (2) greatly emphasizing unusual circumstances, notwithstanding appellee's proof that shipment of fork lift trucks under the circumstances of this case was the usual course of business of appellee (Vol. II, T. 52-53), (3) negativing the idea of imbalance, (4) directing the jury at different points and commenting "I do not see much to this engineering talk on both sides about the center of gravity and the like," and "You are not trying the engineering features of this machine as a general proposition," (5) and stating that the only question was whether there was negligence in failing to give warning that there was some unusual risk as to balance in handling the Gerlinger Carrier.

A jury following these instructions could do nothing but ignore the extensive testimony of Mr. James. His qualifications as a consulting engineer competent to testify concerning the static and dynamic stability of the Gerlinger carrier concerned, and its dangerous condition, was never challenged. The only objection to any of his testimony was that part stating that a slight change of design in 1949 had no significant effect upon stability under the circumstances of the case. (Vol. II, T. pp. 129-130.)

Comment of the Court that there was no way to avoid imbalance if the machine were driven with the boom off, as could be expected, before the machine was put to its intended use was followed by the confusing statement "I don't say there was any imbalance. There is testimony here to the effect that the balance was very little affected when the boom was off, but that is a question, as I say, for your consideration." (Vol. II, T. 236-237.)

Next the Court stated that the sole question was whether some kind of warning should have been given under the circumstances of the case, and ignored the theory of negligence predicated upon *MacPherson v. Buick,* 217 N.Y.S. 382, 111 N.E. 1050, L.R.A. 1916F, 696, *Kalash v. L. A. Ladder Co.,* 1 Cal. 2d 229, 34 P. 2d 481, a defective ladder, and *Owen v. Rheem Mfg. Co.,* 83 C.A.2d 42, 187 P.2d 785, defectively loaded railroad freight car, and *Hale v. Depaoli,* 33 Cal.2d 228, 201 P.2d 1, defectively constructed porch resulting in injuries a decade after construction. These cases show a manufacturer is liable if he places a product

on the market reasonably certain to place life and limb in peril if negligently prepared or constructed, as distinct from the negligence in failure to warn of a known dangerous condition. (Vol. II, T 237-238.) The Court mixed its instruction concerning notice with comments upon the long experience of appellee in the business, the absence of prior accidents, which was based upon the irrelevant and incompetent testimony previously discussed in this brief.

The danger of mixing comments on fact and statements of law without careful distinction was a subject of the appeal in *Lynch v. Oregon Lumber Co.,* 108 F.2d 282, as grounds for reversal.

It was stated in *Quercia v. United States,* 289 U.S. 466, 470, ... S.Ct. ....., 77 L.ed. 1321, 1325, that:

> "This privilege of the judge of comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but *he may not either distort it or add to it.* His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. *The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'* " (Emphasis supplied.)

The Court further instructed to the effect that appellee's negligence, if any, must be a proximate cause

of injury, but there was no instruction that contributory negligence of appellant, if any, must be a proximate cause. (Vol. II, T 238-240.)

It was error to instruct on the subject of contributory negligence at all. The substance of testimony having a direct bearing on contributory negligence was:

(a) Appellee's exhibit A, a statement dated 11/20/52, containing a sentence "I was told by one of the fellows later that there was a washout in the road and when one of the back wheels hit that rut, that is what caused the lift to tip over." (Vol. II, T 36.)

(b) Hearsay testimony by appellee's executive, Williams, (Vol. II, T 53-54) relating a prior instance of an accident due to racing the fork lift truck.

(c) Hearsay testimony of appellee's employee, Gohrke, (Vol. II, T 186-187) of prior accidents under other conditions of excessive speeds and overloading the fork lift truck.

(d) Opinion testimony of appellee's employee, Akers, (Vol. II, T 68-69) that the fork lift truck would tip over if the wheels were suddenly turned at a sharp angle while driving at an excessive speed, where the witness relied upon the engineering department to check and determine safety factors (Vol. II, T 71).

(e) Positive testimony of appellant's witness Philbrook that the appellant was driving the fork lift truck at a slow and safe speed as against a statement, Appellee's exhibit B, containing the sentence "I imagine that the reason the lift tipped over when it hit

the chuckhole was because the boom was not on the lift and he may have been going a little fast and was going to put the brake on and when he did that kind of helped to overbalance the lift." (Vol. II, T 83, 89, 91.)

(f) Appellee's witness Blacketer, not an engineer, and not shown to have had experience with the model of Gerlinger fork lift truck involved, gave testimony to the effect that the larger carriers, not shown to mean a Gerlinger fork lift truck, are heavy pieces of machinery and a person can get hurt if they are not careful. (Vol. II, T 165.)

(g) Opinion testimony of appellee's witness, Herzog, that under the circumstances of this case the only cause of tipping over would be high speed and turning though the witness was not shown to have had experience with the model of Gerlinger carrier involved and not shown to have had any technical training or experience to justify giving an opinion concerning this Gerlinger carrier. (Vol. II, T 174-175.)

(h) Opinion testimony by appellee's witness, Herz, an engineer for another manufacturer of carriers that there is danger in operating a carrier over uneven ground if handled improperly (Vol. II, T 198), and testimony of appellee's employee and witness, Krause, on cross-examination to the effect that the Gerlinger carrier of the type involved here would go a maximum speed of three miles per hour in reverse down a six degree incline (Vol. II, T 230-231).

Appellants have searched the record in vain for any affirmative proof of high speed, sudden turning or

braking of the machine by appellant when he operated it. There is no competent, material, or relevant proof to suggest or justify the opinions given, or that appellant could be guilty of contributory negligence; there is only conjecture and yet the question was put haphazardly to the jury in a mixture of law and comment on facts.

V.

OPINION TESTIMONY BASED UPON EXPERIENCE OF THE WITNESS WITH OTHER TYPES AND MAKES OF MACHINERY AND NOT SHOWN TO BE BASED UPON THE PARTICULAR TYPE AND MAKE OF MACHINE IN THE PRESENT CASE IS INADMISSIBLE.

A. Opinion not admissible where no experience with same type of machine as involved in case was shown.

Appellee's witness Blacketer testified that he had had experience operating Gerlinger fork lift trucks and Hyster carriers and expressed the opinion that there was no great danger in operating the Gerlinger fork lift truck without the front boom. The question and answer was not specifically related to the model of Gerlinger lift truck as turned turtle on appellant. The objection was made for appellant:

> "Mr. Dilley. If the Court please, we have an objection on the ground that this evidence is all immaterial. Until this witness is shown to know that he was operating a vehicle which was built in 1952, containing the same changed counter-balance, as was testified to by Mr. Williams here, we think it is completely immaterial and is of no use whatsoever.

The Court. Overruled.

Mr. Cosgrave. Q. In connection with that, I will ask you what year model the lift truck is that you have there, the Gerlinger?

A. 1949.

Q. Does that have a side shifter on it?

A. No.

Q. Well, you know that a side shifter entails more weight on the front end?

Mr. Dilley. Objection, Your Honor, on the ground that this is leading and suggestive.

The Court. Overruled.

Mr. Cosgrave. Q. Would it be necessary to put more weight on the back end to offset that?

A. Yes, it would.

Mr. Dilley. Objection is made, your Honor, on the ground previously stated, and I move that the answer be stricken from the record.

The Court. Denied.

Mr. Cosgrave. Q. If you were here giving your opinion on a Gerlinger carrier that had additional weight on the back end to compensate that, would it make any difference in your opinion?

A. No. I feel the margin of safety would take care of that.

Mr. Dilley. I do not wish to object any more or take the time to make any additional objections. May it be understood that we have an objection to this entire line of questioning so that the record will be preserved?

The Court. It is so understood.

Mr. Cosgrave. Q. Would you go on and tell the jury what the situation is with the Hyster when you drive it up a ramp, what your experience has been?

A. I drove it off a platform, and we have an incline coming into our building that is about 44 inches high, and it slopes up about 30 feet. I drove this Hyster down the ramp without the boom on and then I tried to bring it back up and I couldn't because there wasn't enough weight on the drive wheels to give me traction. Then I tried to back it up and throw more weight to the front end and I couldn't do it then.

Q. In your opinion was that because it had weight at the rear end?

A. Right.'' (Vol. II, T 165-167.)

Authority for exclusion of the testimony is substantially the same as in the following point hereinbelow discussed.

B. Opinion testimony concerning the effect of relocating a part of the mechanism or adding weight to different location on the machine without qualifying the witness as an expert in such matters is inadmissible.

Appellee's witness, Harry A. Herzog, testified that he had had experience in operating different kinds of fork lift trucks in lumber operations and that, in his opinion, (1) shifting the side shifter mechanism, or (2) adding 1000 pounds to a different location on the Gerlinger carrier would make no difference in its stability, over the objections that the witness had no experience or knowledge qualifying him as an expert concerning the Gerlinger carrier involved in this action. (Vol. II, T 172-174.)

Appellee's witness, Gohrke, assistant manager of appellee, was allowed to testify that in his opinion a

difference of 1500 pounds between the Gerlinger carrier that fell on appellant and the carrier involved in the U.S. Navy Compliance Tests would make no difference as to whether the Gerlinger carrier here involved would pass the compliance tests over the objection that the opinion had no sufficient foundation in data and facts susceptible of proof as distinguished from a layman's observation. (Vol. II, T. 183.)

Neither of these witnesses were shown to have any detailed understanding of the actual factors involved in determining safety factors, nor was it shown just what the capability of the carrier to pass the Navy tests had to do with the circumstances of the events in this case.

The testimony fails to show experience with the model machine that injured appellant. The situation is so unusual that counsel for appellant have been unable to locate a previous case directly in point. It is, however, analogous to the situation in which an expert witness is asked for an opinion following a hypothetical question based upon facts not in evidence. No significant similarity between the experience of the witnesses and the circumstances in which plaintiff was injured appears, nor was it shown that these witnesses were competent to testify that there were no significant differences. We then have reference to cases such as *Raub v. Carpenter,* 187 U.S. 159, 47 L.ed. 119, 23 S.Ct. 72, in which Chief Justice Fuller stated that the trial Court acted properly in sustaining an objection to a question for an opinion from "all that you

known about him yourself," because it called for an opinion based upon facts not shown to be in evidence. Other cases in the same vein are collected in the annotation "Hypothetical Question in Case of Expert Witness Who Has Personal Knowledge or Observation of Facts," in 82 A.L.R. 1338, at pages 1340-1341.

The damaging shot-gun effect of this testimony is readily apparent when it is recalled that the trial Court gave instructions to the jury particularly minimizing engineers leaving open the later testimony of these witnesses purporting to speak from practical experience in the field without knowledge of what the safety factors actually were or what effect changes in design would have.

VI.

ERROR ONCE SHOWN IS PRESUMPTIVELY PREJUDICIAL UNLESS ABSENCE OF PREJUDICE SHOWS FROM THE ENTIRE RECORD ON APPEAL.

Appellant has discussed the principal points of error; the burden is on the appellee to show that the errors were not prejudicial. The errors shown are vital to appellee's defense and appellant believes that no amount of explanation can remove the prejudicial effects of each of the matters discussed. *Lynch v. Oregon Lumber Co.,* 108 F. 2d 282.

CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court for the District of Oregon should be reversed and the cause remanded for a new trial upon the issue of damages alone, or in the alternative, for a new trial upon all issues.

Dated, Santa Rosa, California,
February 7, 1955.

Respectfully submitted,

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